

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

DETROY LIVINGSTON,  
Plaintiff

vs.

JAMES ESGROW, ET AL., October 24, 2013  
Defendant. 8:30 a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE FRANK P. GERACI, JR.  
UNITED STATES DISTRICT JUDGE

DETROY LIVINGSTON, PRO SE

NYS ATTORNEY GENERAL OFFICE  
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Appearing on behalf of the Defendants

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3 Charge by Judge Geraci

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## PROCEEDINGS

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(WHEREUPON, the jury is not present).

**MR. LIVINGSTON:** Yes.

**MR. BENITEZ:** Nothing further.

08:42:02AM10 THE COURT: Mr. Livingston?

MR. LIVINGSTON: No.

12 | THE COURT: Thank you, we can bring the jury out.

13 | (WHEREUPON, the jury is present).

14 THE COURT: Good morning, ladies and gentlemen.

08:43:19AM15 Members of the jury, now that you've heard all the evidence in  
16 the case, it now becomes my duty to instruct you on the law,  
17 the rules and principles that will guide your deliberations.

18 In any jury trial, in effect, there are two judges.

19 I am one of the judges, the judge of the law; and you are the  
20 other judge, the judge of the facts. Over the next several  
21 minutes I'll be reading you the law. It's important I read it  
22 to you because you have to receive it exactly as it provides.

23 As a judge of the facts it's important that you  
24 make your determination in this case and reach your decision  
25 and follow your sworn duty to follow the law as I instruct

1 you. You must follow all my instructions as a whole. You  
2 have no right to disregard or to question the wisdom or the  
3 correctness of the rules which I'm about to state to you. You  
4 must not substitute or follow your own notion or opinion as to  
08:44:20AM 5 what the law is or what you think it ought to be.

6 It is your duty to apply the law exactly as I give  
7 it to you regardless of the consequences.

8 You are to perform your duty without bias and  
9 prejudice to any party.

08:44:35AM 10 The law does not permit jurors to be governed by  
11 sympathy, by prejudice, or by public opinion.

12 It is expected you will carefully and impartially  
13 consider all the evidence in this case, follow the law as  
14 instructed by the Court, and reach a just verdict regardless  
08:44:53AM 15 of the consequences.

16 The evidence in this case consists of the sworn  
17 testimony of witnesses regardless of who may have called them;  
18 and all the exhibits that were received in evidence regardless  
19 of who may have produced those.

08:45:08AM 20 Statements and arguments of the parties are not  
21 evidence. Any evidence as to which an objection was sustained  
22 by the Court and any evidence ordered stricken by the Court  
23 must be disregarded by you.

24 Anything you may have seen or heard outside the  
08:45:24AM 25 courtroom is not evidence and must be entirely disregarded.

1                   You are to consider only the evidence in the case,  
2 but in your consideration of the evidence, you are not limited  
3 to the bald statements of the witnesses. In other words,  
4 you're not limited solely to what you see or hear as a witness  
08:45:44AM 5 testifies. You are permitted to draw from the facts which you  
6 find have been proven such reasonable inferences as you feel  
7 are justified in light of your experience.

8                   There are two types of evidence which you may  
9 properly use in deciding the fact issues in this case. One  
08:46:03AM10 type of evidence is called direct evidence. Direct evidence  
11 is where a witness testifies what they saw, or heard, or  
12 observed.

13                   In other words, when a witness testifies about what  
14 is known to them through their own knowledge by virtue of  
08:46:19AM15 their own senses, what they see, feel, touch or hear, that's  
16 called direct evidence.

17                   Circumstantial evidence is evidence which tends to  
18 prove a disputed fact by proof of other facts.

19                   There's a simple example of circumstantial evidence  
08:46:36AM20 which is often used. Assume when you came into the courthouse  
21 this morning the sun was shining and it was a nice day. As  
22 you were sitting here someone walked in with an umbrella which  
23 was dripping wet, someone else walked in with a raincoat which  
24 was also dripping wet. Now, you cannot look outside of the  
08:46:54AM25 courtroom, and you cannot see whether or not it is raining so

1 you have no direct evidence of that fact.

2                   However, based on the combination of facts which I  
3 have asked you to assume, it would be reasonable and logical  
4 for you to conclude that it had been raining. That's all  
08:47:10AM 5 there is to circumstantial evidence.

6                   You infer on the basis of reason and experience and  
7 common sense from an established fact the existence or the  
8 non-existence of some other fact.

9                   Circumstantial evidence is of no less value than  
08:47:26AM10 direct evidence. For it is a general rule that the law makes  
11 no distinction between direct and circumstantial evidence.

12                   Nor is a greater degree of certainty required of  
13 circumstantial evidence than direct evidence. You should  
14 weigh all the evidence in the case, direct and circumstantial,  
08:47:43AM15 in deciding the fact issues in this case. If a party asks a  
16 witness a question which contains an assertion of fact, you  
17 may not consider the assertion as evidence of that fact.

18                   The parties' statements are not evidence whether  
19 the statements are made during opening or closing or during  
08:48:05AM20 the case.

21                   If any reference by the Court or by the parties to  
22 matters of evidence does not coincide with your recollection,  
23 it is your recollection which should control during your  
24 deliberations.

08:48:19AM25                   During the course of the trial I may have

1 occasionally asked questions of witnesses in order to bring  
2 out facts not then fully covered in the testimony. Do not  
3 assume that I hold any opinion as to the matters to which my  
4 questions may have been addressed or related. In short, you  
08:48:35AM 5 should not view anything that the Court did or said as any  
6 indication that I have any opinion on a fact issue in this  
7 case. It is your province to decide the issues in this case  
8 and not the Court's.

9                   As you know, the defendant has proceeded -- excuse  
08:48:52AM10 me. The plaintiff has proceeded pro se in this case, which  
11 means he's proceeding without the assistance of counsel,  
12 representing himself. That is his right. And that should in  
13 no way have any effect on your determination of the issues in  
14 this case.

08:49:12AM15                   It's the duty of a party on each side of the case  
16 to object when the other side offers testimony or other  
17 evidence which that party believes is not properly admissible.  
18 You should not show prejudice against a party because that  
19 party made objections. Upon allowing testimony or other  
08:49:29AM20 evidence to be introduced over the objections of a party, the  
21 Court does not, unless expressly stated, indicate any opinion  
22 as to the weight or effect of such evidence.

23                   As stated before, you are the sole judges of the  
24 credibility of all witnesses and the weight and the effect of  
08:49:47AM25 all evidence.

1           When the Court has sustained an objection to a  
2 question addressed to a witness, then the jury must disregard  
3 the question entirely. You may draw no inference from the  
4 wording of it or speculate as to what the witness would have  
08:50:02AM 5 said if they had been permitted to answer the question.

6           When we began this trial I did advise you, members  
7 of the jury, that the plaintiff is in custody. Again, that  
8 fact has nothing to do with the merits of this case and you're  
9 not to speculate regarding his custodial status or let that in  
08:50:26AM10 any way affect your determination.

11           This is a civil case, and as such the plaintiff has  
12 the burden of proving the material allegations of his  
13 complaint by a fair preponderance of the evidence.

14           If after considering all the evidence you are  
08:50:39AM15 satisfied that the plaintiff has carried his burden on each  
16 essential point as to the burden of proof, then you must find  
17 for the plaintiff on his claim. If after such consideration  
18 you find the testimony of both parties to be balanced or  
19 equally probable, then the plaintiff has failed to sustain his  
08:51:00AM20 burden and you must find for the defendant.

21           The party with the burden of proof on any issue has  
22 the burden of proving every disputed element of his claim by a  
23 preponderance of the evidence. If you conclude that the party  
24 bearing the burden of proof has failed to establish his claim  
08:51:19AM25 by a preponderance of the evidence, then you must decide

1 against him on the issue you are considering. What does a  
2 preponderance of the evidence mean? To establish a fact by a  
3 preponderance of the evidence means to prove that a fact is  
4 more likely true than not true.

08:51:38AM 5                   A preponderance of the evidence means the greater  
6 weight of the evidence, it refers to the quality and the  
7 persuasiveness of the evidence. Not the number of witnesses  
8 or the number of documents. In determining whether a claim  
9 has been proven by a preponderance of the evidence, you may  
08:51:55AM10 consider the relevant testimony of all witnesses regardless of  
11 who may have called them, and all the relevant exhibits  
12 received in evidence regardless of who may have produced  
13 those.

14                   If you find that the credible evidence on a given  
08:52:12AM15 issue is evenly divided between the parties, it is equally  
16 probable that one side is right as it is that the other side  
17 is right, then you must decide that issue against the party  
18 having this burden of proof.

19                   That is because the party bearing this burden must  
08:52:28AM20 prove more than simple equality of evidence, must prove that  
21 element at the time by a preponderance of the evidence.

22                   On the other hand, the party with the burden of  
23 proof need prove no more than a preponderance of the evidence,  
24 as long as you find that the scales tip, however slightly in  
08:52:47AM25 favor of the party with this burden of proof, that what the

1 party claims is more likely true than not true, then the  
2 element will have been proven by a preponderance of the  
3 evidence.

4                   Some of you may have heard the term "beyond a  
08:53:04AM 5 reasonable doubt," which is the proper standard of proof in a  
6 criminal trial. That requirement does not apply in a civil  
7 case such as this and you should put that particular standard  
8 out of your mind.

9                   Now, I want to talk about witnesses and how to  
08:53:19AM10 evaluate their testimony. It must be clear to you by now that  
11 you are being called to resolve various factual issues raised  
12 by the parties in light of very different pictures painted by  
13 both sides. You must determine these issues, and in doing  
14 that you will have to determine what witnesses to believe. In  
08:53:41AM15 other words, you are the judges or determiners of the  
16 believability or credibility of the witnesses.

17                   You must determine what weight to give to the  
18 testimony of each witness. You have the right to accept any  
19 witness' testimony completely or to reject it completely; you  
08:53:57AM20 may accept a witness' testimony in part and reject it in part.  
21 How do you determine whether the -- where the truth lies and  
22 whether to credit a witness' testimony?

23                   You should use all the tests for truthfulness that  
24 you would use in determining matters of importance to you in  
08:54:16AM25 your every day life. You should carefully scrutinize all the

1 testimony given, the circumstances under which a witness  
2 testified, and every matter in evidence which tends to show  
3 whether a witness is worthy of belief.

4 Consider the witness' intelligence, state of mind,  
08:54:33AM 5 demeanor, manner while testifying on the witness stand.

6 How did the witness appear? What was their  
7 demeanor? That is, their behavior, manner and appearance  
8 while testifying. Consider the witness' ability to observe  
9 the matters as to which the witness testified. Consider  
08:54:53AM 10 whether the witness had an accurate recollection of the  
11 matters in question.

12 Consider the opportunity the witness had to see,  
13 hear or know the things about which they testified. The  
14 accuracy of their memory, their candor or lack of candor and  
08:55:09AM 15 the reasonableness and probability of their testimony and its  
16 consistency or lack of consistency in its corroboration or  
17 lack of corroboration with other credible testimony.

18 You may also consider the motive that a witness has  
19 to testify. You may consider the relation any witness may  
08:55:29AM 20 bear to either side of the case, the witnesses in the outcome  
21 of the case and the manner in which the witness might be  
22 affected by the verdict.

23 You may consider any bias or hostility the witness  
24 may have shown for any party or against any party. In other  
08:55:46AM 25 words, what you must try to do in deciding credibility is size

1 up the witness in light of all the factors I've just mentioned  
2 and in light of your common sense, your good judgment and your  
3 own life experience and determine whether the witness is  
4 worthy of belief.

08:56:03AM 5                   Inconsistencies and discrepancies in the testimony  
6 of a witness or between the testimony of different witnesses  
7 may or may not cause a jury to discredit such testimony. Two  
8 or more persons witnessing an incident or transaction may see  
9 or hear it differently. An innocent misrecollection, like  
08:56:22AM10 failure to recall, is not an uncommon experience. In weighing  
11 the effect of a discrepancy, always consider whether it  
12 pertains to a matter of importance or an unimportant detail  
13 and whether the discrepancy results from innocent error or  
14 intentional falsehood.

08:56:40AM15                   After making this judgment, you will give the  
16 testimony of each witness such credibility that you feel it  
17 deserves.

18                   You may have heard testimony that a witness made a  
19 statement on an earlier occasion which the party argues is  
08:56:54AM20 inconsistent with the witness' trial testimony.

21                   Of course, you must determine if the prior  
22 statement is truly inconsistent. In general, evidence of a  
23 prior inconsistent statement was placed before you for the  
24 limited purpose of helping you decide whether to believe the  
08:57:12AM25 trial testimony of the witness who contradicted themselves.

1           If you find that the witness made an earlier  
2 statement that conflicts with their trial testimony, you may  
3 consider that fact in deciding how much of their testimony, if  
4 any, to believe.

08:57:31AM 5           The law does not require the parties to call as  
6 witnesses all persons who may have been present at any time or  
7 place involved in the case or may appear to have some  
8 knowledge of the matters in issue at this trial.

9           Nor does the law require the parties to produce all  
08:57:48AM10 the exhibits, all papers, and all things mentioned in the  
11 evidence. However, judging the credibility of the witnesses  
12 who have testified and in considering the weight and the  
13 effect of all the evidence that has been produced, the jury  
14 may consider the party's failure to call other witnesses or  
08:58:05AM15 produce other evidence in the case to be in existence and  
16 available.

17           In this particular case, members of the jury, the  
18 plaintiff has testified that he was attempting to appeal  
19 various issues related to a criminal conviction. The  
08:58:26AM20 underlying basis of those criminal acts are irrelevant to your  
21 determination here and you're not to let it in any way effect  
22 your determination. You may consider the interest or lack of  
23 interest of any witness in the outcome of the case, the bias  
24 or prejudice of a witness if there's any, the appearance,  
08:58:47AM25 manner in which the witness gives their testimony, the

1 opportunity the witness had to observe the facts concerning  
2 about which they testified, the probability or improbability  
3 of the witness' testimony in view, in light of all the  
4 evidence in the case. These are all items that you should  
08:59:05AM 5 take into consideration in determining the weight, if any,  
6 that you will assign to a witness' testimony.

7 In connection with your evaluation of the  
8 credibility of the witnesses, you should specifically consider  
9 evidence of resentment or anger which some witnesses may have  
08:59:23AM10 toward a party or that a witness may have against another  
11 witness.

12 Evidence that a witness is biased, prejudiced or  
13 hostile toward a party requires you to view that witness'  
14 testimony with caution, to weigh it with care and subject it  
08:59:38AM15 to close and searching scrutiny.

16 At this time I'm going to turn to the cause of  
17 action in this case. There's one cause of action that the  
18 plaintiff alleges the law to be applied in this case. It is a  
19 federal civil rights law which provides a remedy for  
09:00:08AM20 individuals who have been deprived of their constitutional  
21 rights under color of state law.

22 Section 1983 of Title 42 of the United States Code  
23 provides as follows: Every person, who under color of any  
24 statute, ordinance, regulation, custom or usage of any state  
09:00:30AM25 or territory or the District of Columbia, subjects or causes

1 to be subjected any citizen of the United States or other  
2 person within the jurisdiction thereof to the deprivation of  
3 any rights, privileges or immunities secured by the  
4 Constitution and laws shall be subject -- shall be liable to  
09:00:53AM 5 the party injured in an action at law, suit in equity, or  
6 other proper proceedings for redress.

7                   Section 1983 creates a federal remedy for persons  
8 who have been deprived by state officials of rights,  
9 privileges and immunity secured by the United States  
09:01:14AM10 Constitution and federal statutes.

11                  The plaintiff has the burden of proving each  
12 essential element of a 1983 claim by a preponderance of the  
13 evidence. To prove an assertion by a preponderance of the  
14 evidence means proving that it is more likely true than not  
09:01:32AM15 true. If you find that any of the essential elements of the  
16 plaintiff's 1983 claim has not been proven by a preponderance  
17 of the evidence, then you must return a verdict for the  
18 defendant.

19                  To establish a claim under Section 1983, the  
09:01:49AM20 plaintiff must establish by a preponderance of the evidence  
21 the following elements.

22                  First, that the acts complained of were committed  
23 by the defendant acting under color of state law.

24                  Two, that in committing these acts the defendant  
09:02:07AM25 intentionally or recklessly deprived the plaintiff of rights,

1      privileges or opportunities secured by the Constitution or  
2      laws of the United States.

3                 Three, that the defendant's acts were the proximate  
4      cause of the injuries sustained by the plaintiff.

09:02:26AM 5                 Now, we'll examine each of these elements in  
6      detail. The first element of the plaintiff's claim that the  
7      conduct complained of was committed by the defendant acting  
8      under color of state law. "Actions under color of state law"  
9      means that the defendant claims to be acting pursuant to  
09:02:45AM10     authority given them by the state even if he is misusing that  
11     authority.

12                 The term "state" here also encompasses any  
13     political subdivision of the state, such as a county or city  
14     or any other state, county or city agencies.

09:03:02AM15                 Whether the plaintiff -- defendant, I'm sorry,  
16     committed the acts alleged by the plaintiff is a question of  
17     fact for you the jury to decide.

18                 Assuming that the defendant did commit those acts,  
19     I instruct you that since the defendant purported to be taking  
09:03:19AM20     those acts in capacity as an official of the State of New York  
21     at the time of the acts in question, the defendant here was  
22     acting under color of state law.

23                 The second element of the plaintiff's claim is that  
24     the defendant in committing the acts complained of  
09:03:34AM25     intentionally or recklessly deprived the plaintiff of a

1 federal right. In order for the plaintiff to establish this  
2 second element, he must show that those acts that you have  
3 found the defendant to, under color of state law, caused the  
4 plaintiff to suffer the loss of a federal right and that in  
09:03:54AM 5 performing those acts the defendant acted with an intent to  
6 deprive the plaintiff of his rights, or the reckless disregard  
7 of those rights.

8 To prove the second element of this claim the  
9 plaintiff must not only show that the defendant's act deprived  
09:04:10AM 10 the plaintiff of a federal right, but also that the defendant  
11 took those acts with the intent to deprive the plaintiff of  
12 his rights or the reckless indifference to those rights. An  
13 act is intentional if it is done voluntarily and deliberately  
14 and not because of mistake, accident, negligence, or some  
09:04:32AM 15 other innocent reason.

16 Please note that intent can be proved directly or  
17 it can be proved by reasonable inference from circumstantial  
18 evidence.

19 An act is reckless if done in conscious disregard  
09:04:47AM 20 of its known probable consequences. In other words, even if  
21 the defendant did not intentionally seek to deprive the  
22 plaintiff of the plaintiff's rights, if nevertheless they  
23 purposefully disregarded the high probability that their  
24 actions would deprive the plaintiff of the plaintiff's rights  
09:05:03AM 25 then the second element would be satisfied.

1                   The third element which the plaintiff must prove is  
2 that the defendant's acts were the proximate cause of injuries  
3 sustained by the plaintiff. An act is the proximate cause of  
4 an injury if it was a substantial factor in bringing about  
09:05:21AM 5 that injury, if the injury was a reasonably foreseeable  
6 consequence of the defendant's acts.

7                   In this case the defendant, excuse me, the  
8 plaintiff alleges a denial of his access to the courts. The  
9 plaintiff has the burden to prove that the acts of the  
09:05:40AM10 defendant Renee Gates deprived him of particular rights under  
11 the United States Constitution. In this case the plaintiff  
12 alleges that the defendant deprived him of his rights under  
13 the First Amendment to the Constitution; under the First  
14 Amendment a citizen has a right to access to the courts.

09:06:01AM15                   To succeed in his claim of denial of access to the  
16 courts, plaintiff must prove each of the following elements by  
17 a preponderance of the evidence.

18                   One, that the defendant Renee Gates did deprive him  
19 of access to the courts by intentionally holding back his  
09:06:20AM20 legal mail.

21                   An act is intentional if it is done voluntarily and  
22 deliberately and not because of a mistake, accident,  
23 negligence or other innocent reason.

24                   Please note that intent can be proved directly or  
09:06:34AM25 can be proved by reasonable inference from circumstantial

1 evidence.

2 Two, that the defendant Renee Gates acted under  
3 color of law. By this I mean a person performs or claims to  
4 perform official duties under any state, county or municipal  
09:06:52AM 5 law, ordinance or regulation.

6 Three, that the defendant Renee Gates' conduct  
7 hindered the plaintiff's efforts to pursue a meritorious legal  
8 claim.

9 Four, the case which the plaintiff wanted to bring  
09:07:09AM10 to court was not frivolous. A claim is frivolous if it is so  
11 trivial that there is no chance it would succeed in court or  
12 be settled out of court after it was filed.

13 And five, that the plaintiff was harmed by the  
14 defendant Renee Gates' conduct.

09:07:27AM15 If you find that the plaintiff has proved each of  
16 these elements by a preponderance of the evidence, then you  
17 should find for the plaintiff and go on to consider the  
18 question of damages.

19 If, on the other hand, you find that the plaintiff  
09:07:42AM20 has failed to prove any one of these elements by a  
21 preponderance of the evidence, then you should find for the  
22 defendant and you will not then consider the issue in question  
23 of damages.

24 I will now charge you on the law of damages.

09:08:03AM25 My charge to you on the law of damages must not be

1 taken as an indication that you should find for the plaintiff.  
2 It is for you to decide on the evidence presented based on the  
3 rules of law that I provided to you whether the plaintiff is  
4 entitled to recover from the defendant.

09:08:22AM 5                   If you decide that the plaintiff is not entitled to  
6 recover, then you need go no further. Only if you decide that  
7 the plaintiff is entitled will you consider the measure of  
8 damages.

9                   If you find that the plaintiff is entitled to  
09:08:37AM 10 recover, you have in your discretion to award either nominal  
11 or compensatory damages or combination of these damages.

12                   Again, please keep in mind, any damage you may  
13 award must be proximately caused by the conduct charged  
14 against the defendant.

09:08:55AM 15                   To say that the defendant's conduct was the  
16 proximate cause of the plaintiff's injury is to say that the  
17 injuries to the plaintiff followed naturally and directly from  
18 the defendant's conduct.

19                   The plaintiff has the burden on this issue to show  
09:09:09AM 20 by a preponderance of the evidence that there was a causal  
21 link or relationship between the defendant's conduct and his  
22 damages.

23                   Keep in mind that the damage award must be just and  
24 reasonable and must not be excessive nor inadequate.

09:09:26AM 25                   Damages must be reasonable. If you should find

1 that the plaintiff is entitled to a verdict, you may award him  
2 only such damages as will reasonably compensate him for such  
3 injury and damages you find from a preponderance of the  
4 evidence in the case that he has sustained as a proximate  
09:09:47AM 5 result of the incident.

6 You are not permitted to award speculative damages.  
7 Therefore, you're not to include in any verdict compensation  
8 for any prospective loss if it's not reasonable to occur in  
9 the future.

09:10:13AM 10 In order to recover compensatory damages, the  
11 plaintiff must prove by a preponderance of the evidence that  
12 the damages in question resulted from the wrongful conduct of  
13 the defendant. In other words, the plaintiff must first prove  
14 by a preponderance of the evidence that the plaintiff actually  
09:10:30AM 15 suffered those damages.

16 Plaintiff must also prove by a preponderance of the  
17 evidence that the defendant's wrongful conduct was the cause  
18 of those damages.

19 You may award compensatory damages for any  
09:10:43AM 20 emotional distress, pain and suffering, inconvenience, mental  
21 anguish, embarrassment, humiliation, or reputation suffered by  
22 the plaintiff as a result of wrongful conduct by the  
23 defendants.

24 If, however, you find that the plaintiff suffered  
09:11:01AM 25 anguish, stress or other injuries, you may not award

1 compensatory damages if you find that the plaintiff would have  
2 still suffered those damages even if the defendant had not  
3 committed any wrongful act.

4                   In other words, if you find that some factor other  
09:11:16AM 5 than the defendant's conduct was the cause of an injury to the  
6 plaintiff, then you may not award such damages to the  
7 plaintiff in this case.

8                   In determining the amount of any compensatory  
9 damages that you decide to award, it should be decided solely  
09:11:32AM10 by the evidence and your common sense.

11                  The law does not require the plaintiff prove the  
12 amount of loss with mathematical precision. No evidence of  
13 monetary value of such intangible things as pain and suffering  
14 has been or need be introduced into evidence in the trial.

09:11:50AM15 There's no exact method for determining the amount of these  
16 damages. However, compensatory damages need not be based on  
17 guesswork or sympathy; you must base it on the evidence  
18 presented at trial and only that evidence. Plaintiff has the  
19 burden of proving any compensatory damages by a preponderance  
09:12:10AM20 of the evidence.

21                  Nominal damages are awarded when a plaintiff has  
22 been deprived by a defendant of a constitutional right, but  
23 has suffered no actual damage as a natural consequence of that  
24 deprivation.

09:12:25AM25                  The mere fact that a constitutional deprivation

1 occurred as an injury to the person entitled to enjoy that  
2 right, even when no actual damages flow from the deprivation.

3                   Therefore, if you find that the plaintiff has  
4 suffered no actual injury as a result of the defendant's  
09:12:42AM 5 conduct, other than the fact of a constitutional deprivation,  
6 then you will award nominal damages not to exceed \$1.

7                   You will soon return to the jury room to decide  
8 this case. In order to prevail the plaintiff must sustain his  
9 burden of proof as I have just explained to you with respect  
09:13:16AM10 to each element of the cause of action. If you find that the  
11 plaintiff has succeeded, you should return a verdict in his  
12 favor.

13                   If you find the plaintiff has failed to sustain the  
14 burden on any element of the claim, then you should return a  
09:13:30AM15 verdict against the plaintiff.

16                   It is your duty as jurors to consult with one  
17 another, to deliberate with a view toward reaching an  
18 agreement. Each of you must decide the case for yourselves,  
19 but only after you had an opportunity to consider the case  
09:13:47AM20 with your fellow jurors and you should not hesitate to change  
21 your opinion if convinced it is erroneous.

22                   Your verdict must be unanimous. But you're not  
23 bound to surrender your honest convictions concerning the  
24 weight and the effect of the evidence for the mere purpose of  
09:14:04AM25 returning a verdict or solely because of the opinion of other

1 | jurors.

09:14:35AM10 No juror should surrender their conscientious  
11 belief solely for the purpose of returning a unanimous  
12 verdict. It is your duty to try the issues fairly and  
13 impartially. Your final determination of facts must be based  
14 only on the evidence. Each of you is entitled to your own  
09:14:54AM15 opinion, but you're required to exchange views with each  
16 other.

17 That obviously is the purpose of jury  
18 deliberations, to discuss and consider the evidence, listen to  
19 the arguments and the reasons of your fellow jurors and to  
09:15:08AM20 present your own individual point of view and reach an  
21 agreement if you solely and only on the evidence can do so  
22 without violence to your own individual judgment.

23 If by chance you have a point of view that does not  
24 agree with one of the other jurors, if you are persuaded that  
09:15:25AM25 the other point of view is justified based on the evidence,

1 there's no reason why you should hesitate to change your  
2 judgment accordingly. But, again, no juror should give up  
3 their judgment unless they are satisfied that the indicated  
4 result was required under the evidence and under the  
09:15:44AM 5 instructions of the law that I provided to you.

6 Your verdict must be based solely on the evidence  
7 or the lack of evidence. It would be improper for you to  
8 consider any personal feelings you may have about one of the  
9 parties, about anybody's race, religion, national origin, sex,  
09:16:02AM 10 or age.

11 It would be equally improper for you to allow any  
12 feelings you have about the nature of the claim against the  
13 defendant to influence you in any way.

14 Both parties in this case are entitled to a trial  
09:16:16AM 15 free from prejudice. Our judicial system cannot work unless  
16 you reach a verdict through fair and impartial consideration  
17 of the evidence.

18 There are a few remaining rules which you must  
19 observe during your deliberation. While you're here in the  
09:16:33AM 20 courthouse deliberating, you will be kept together in the jury  
21 room. You may not leave the jury room during deliberations.  
22 If you have any cell phones or any other electronic devices,  
23 they will be collected by the court security officer to hold  
24 for you while you're engaged in deliberations.

09:16:51AM 25 You must deliberate about the case only when you

1 are all gathered together in the jury room. You must not, for  
2 example, be discussing the case as you go to and from the  
3 courtroom.

4                   It's important that each juror have the opportunity  
09:17:04AM 5 to hear whatever another juror has to say about the case. And  
6 that by law must only be done when you're all gathered  
7 together in the jury room.

8                   Thus, if for any reason you're not gathered  
9 together in the jury room, you must stop deliberations until  
09:17:20AM10 you're all present in the jury room.

11                  During your deliberations you must discuss the case  
12 only among yourselves. You must not discuss the case with  
13 anybody else or permit anyone other than the fellow jurors to  
14 discuss the case in your presence.

09:17:37AM15                  If you have a question, you must communicate with  
16 me in writing. We will provide you with sheets for that  
17 purpose. The law requires that you communicate with me in  
18 writing in order to make sure there's no misunderstandings  
19 about your communication.

09:17:54AM20                  I don't think anybody's taken notes, but any notes  
21 that you did take are for your own aid in refreshing your own  
22 independent recollection.

23                  Those jurors who choose not to take notes must rely  
24 on their own independent recollection, must not be influenced  
09:18:12AM25 by the notes of other jurors. Any notes you take are for your

1 own personal use in refreshing your recollection.

2                   Your notes are not a substitute for the recorded  
3 transcript of the testimony. Any discrepancy between your  
4 recollection and your notes, you should ask to have the  
09:18:27AM 5 relevant testimony read back to you. As you can see, we have  
6 a professional court reporter who is taking down everything  
7 that's said during the course of this trial. If you need any  
8 testimony read back, that can be done.

9                   In addition, your notes are not a substitute for  
09:18:40AM10 the detailed explanation of law I provided to you today. If  
11 there's any discrepancy between your notes and your  
12 recollection, simply ask and I'll explain those principles to  
13 you.

14                   Any notes you do take are confidential; they will  
09:18:54AM15 not be available for inspection or review by any party. And  
16 after a jury has rendered its verdict, the notes will be  
17 collected and they will be destroyed.

18                   You're about to go into the jury room and begin  
19 your deliberations. If during the deliberations you want to  
09:19:09AM20 see any of the exhibits that were received in evidence, you  
21 may request those and they will be brought to you in the jury  
22 room.

23                   If you want any testimony read back to you, you may  
24 also request that, but please remember it's not always easy to  
09:19:23AM25 locate what you might want, so be as specific as possible so

1 that in your request we can easily find the testimony you are  
2 requesting.

3 Your request for exhibits or testimony, in fact,  
4 any communication with the Court, again, must be made in  
09:19:40AM 5 writing, signed by the foreperson, provided to the court  
6 security officer and then it will provided to the Court.

7 In any event, if you have to communicate with the  
8 Court and ask any questions, do not in that note indicate the  
9 status of your deliberations. Simply ask your question.

09:19:59AM10 Under our law, the first juror selected is known as  
11 the foreperson during deliberations. The foreperson's opinion  
12 and vote are not entitled to any more importance than that of  
13 any other juror. What we ask the foreperson to do during  
14 deliberations is to sign any written notes that the jury sends  
09:20:15AM15 to the Court; the foreperson's signature indicates that the  
16 writing does come from the jury.

17 The foreperson may also chair the jury's  
18 discussions during deliberations. When the jury has reached a  
19 verdict, the jury will be brought back into the courtroom, and  
09:20:32AM20 the foreperson will be asked to render the verdict in open  
21 court. Thereafter, the entire jury will be asked whether or  
22 not that is, in fact, their verdict and they will have to  
23 answer either yes or no.

24 Finally, upon the request of any party, each juror  
09:20:49AM25 will be asked individually whether the announced verdict is

1 the verdict of that juror and then upon being asked, each  
2 juror will need to respond yes or no.

6                   After you've reached a verdict, the foreperson will  
7 fill in the verdict form which I will provide to you, sign it,  
8 date it, advise the court security officer outside that you're  
9 ready to return to the courtroom. I stress that each of you  
10 should be in agreement with the verdict which will be  
11 announced in court. Once your verdict is announced by the  
12 foreperson in open court and officially recorded, it cannot  
13 ordinarily be revoked.

14 I have prepared a verdict sheet for your  
15 consideration. It will outline for you the options you have  
16 during your deliberations.

17 If you have any questions regarding the verdict  
18 sheet, simply ask and I'll respond to that question.

19 Parties approach side bar, please.

09:21:56AM20 (WHEREUPON, a discussion was held at side bar out  
21 of the hearing of the jury.)

22                   **THE COURT:** That's the verdict sheet. Do you have  
23 any exceptions or requests? We'll review this later.

24 MR. BENITEZ: I have no exceptions, Judge.

09:22:24AM25 THE COURT: Do you have any exceptions or requests?

1                   **MR. LIVINGSTON:** I didn't -- I might have missed  
2 something. Did you instruct on punitive damage.

3                   **THE COURT:** No, I denied punitive damages.

4                   **MR. LIVINGSTON:** Oh, okay.

09:22:38AM 5                   **THE COURT:** I didn't think there was sufficient  
6 evidence to instruct them on punitive damages.

7                   **MR. LIVINGSTON:** Oh.

8                   **THE COURT:** I'll give you a chance to review that.  
9 Do you have any other exceptions or requests?

09:22:48AM10                   **MR. LIVINGSTON:** No.

11                   (**WHEREUPON**, side bar discussion concluded.)

12                   **THE COURT:** At this time the courtroom deputy will  
13 swear in the court security officer.

14                   (**WHEREUPON**, the marshal was administered the oath).

09:23:09AM15                   **THE COURT:** Members of the jury, at this time I'm  
16 about to submit this case to you for your final determination.  
17 As I previously stated, the law and your oath require that you  
18 render a verdict that will be fair and impartial without fear,  
19 favor or sympathy. Now, take this case in the fulfillment of  
09:23:44AM20 your oath in accordance with the instructions I provided to  
21 you a true and impartial verdict render.

22                   The jury may step down and begin your final  
23 deliberations.

24                   (**WHEREUPON**, the jury was excused at 9:23 a.m.)

09:24:02AM25                   **THE COURT:** At side bar counsel indicated they had

1 no objection to the verdict sheet. That will be marked as  
2 Court Exhibit 1 and provided to the jury.

3 At this time I would like to review the exhibits,  
4 make sure that we have all the right exhibits as received. I  
09:24:47AM 5 have as received Plaintiff's Exhibits 1, 2, 4, 5, 6, 8, 9A,  
6 9B, 9C, 10, 16, 18, 20, 21 and 22; is that right,  
7 Mr. Livingston?

8 **MR. LIVINGSTON:** Yes.

9 **THE COURT:** Okay. Mr. Benitez?

09:25:32AM10 **MR. BENITEZ:** Yes, that's correct.

11 **THE COURT:** Okay. Regarding the defendant's  
12 exhibits, I believe Exhibit 408 was the only one that was  
13 received.

14 **MR. BENITEZ:** Yes, that's correct.

09:25:42AM15 **THE COURT:** Is that right?

16 **MR. LIVINGSTON:** Yes.

17 **THE COURT:** Any objection to providing the exhibits  
18 to the jury without reassembling the parties if they request  
19 them?

09:25:49AM20 **MR. LIVINGSTON:** No, no objection.

21 **THE COURT:** Any objection?

22 **MR. BENITEZ:** None.

23 **THE COURT:** Okay. At this point the verdict sheet  
24 has been marked as Court Exhibit 1. It will be provided to  
09:26:01AM25 the jury. Upon their request the exhibits will also be

1 provided to them. So at this time we'll stand in recess.

2 **MR. BENITEZ:** Thank you, Judge.

3 (WHEREUPON, there was a pause in the proceeding.)

4 **THE COURT:** We do have a verdict from the jury. The

10:39:08AM 5 Court did receive the verdict form to review it, I noticed  
6 what was missing was one other question, was your verdict  
7 unanimous? So I need to send it back in and make sure the  
8 jury answers that particular question. So I think we can hang  
9 tight, I'll have the clerk present it to the courtroom deputy  
10 who will then give it to the court security officer.

11 For the record, I simply added on the verdict  
12 sheet: Was your verdict unanimous with a question mark, yes  
13 or no. And the jury has now responded to that.

14 So at this time we'll bring the jury back to take  
10:42:53AM 15 the verdict.

16 (WHEREUPON, the jury is present).

17 **THE COURT:** The jury indicated they have reached a  
18 verdict. The clerk will provide the foreperson with the  
19 verdict.

10:44:22AM 20 I'd ask the foreperson, please rise as the  
21 courtroom deputy will ask you what your verdict was.

22 **THE CLERK:** Do you find by a preponderance of the  
23 evidence that defendant Renee Gates intentionally violated  
24 plaintiff Detroy Livingston's right to access to the Court?

10:44:40AM 25 **JURY FOREMAN:** No.

1                   **THE CLERK:** Were defendant Renee Gates' actions the  
2 proximate cause of damages sustained by the plaintiff Detroy  
3 Livingston?

4                   **JURY FOREMAN:** No.

10:44:48AM 5                   **THE CLERK:** Was your verdict unanimous?

6                   **JURY FOREMAN:** Yes.

7                   **THE COURT:** Thank you. You may be seated. All of  
8 the members of the jury, you heard the foreperson announce  
9 your verdict to the Court. Was that in all respects your  
10 verdict?

11                   **JURY FOREMAN:** Yes.

12                   **THE COURT:** Jurors have indicated that is. Either  
13 party asking for a polling of the jury?

14                   Mr. Livingston?

10:45:13AM 15                   **MR. LIVINGSTON:** No.

16                   **THE COURT:** Mr. Benitez?

17                   **MR. BENITEZ:** No.

18                   **THE COURT:** Okay. Members of the jury, at this time  
19 I want to thank you for the attention and the care you've  
10:45:19AM 20 given to this case. As I indicated when you were selected, we  
21 cannot function in this system without individuals such as you  
22 willing to put aside your personal and professional time to  
23 serve as jurors.

24                   Please know that the law of jealously guards the  
10:45:34AM 25 secrecy of your deliberations, what you said, what the other

1       jurors said, what you decided may remain locked in that  
2       secrecy.

3                   What that means is basically that you need not  
4       answer to anybody about what your verdict is. If you want to  
10:45:46AM 5       talk about the case once the verdict has been rendered, you're  
6       free to do that, but nobody can make you do that. That's  
7       entirely within your control.

8                   Please go with the full knowledge that you  
9       fulfilled your responsibility as jurors. At this time the  
10:45:59AM 10      jury may step down and I'll come back and talk to you in a few  
11       minutes. You may step down at this time.

12                   (**WHEREUPON**, the jury was excused).

13                   **THE COURT:** At this time the Court will enter the  
14       verdict of no cause against the defendant Renee Gates. I want  
10:46:37AM 15       to thank everybody for their cooperation throughout this  
16       trial.

17                   Mr. Livingston, do you want to say something?

18                   **MR. LIVINGSTON:** Yeah, would this be the  
19       appropriate time for a directed verdict despite judgment?

10:46:53AM 20                   **THE COURT:** Go ahead, sure.

21                   **MR. LIVINGSTON:** I think I proved my point to show  
22       cause and I like to move for a directed verdict on -- from you  
23       notwithstanding the verdict.

24                   **THE COURT:** Okay. Mr. Benitez?

10:47:13AM 25                   **MR. BENITEZ:** Basically I oppose that motion,

1 Judge, on the same grounds that I had provided to the Court on  
2 my Rule 50 motion on those three bases. One, that there was a  
3 lack of personal involvement.

4 That there was an insufficient amount of facts to  
10:47:29AM 5 support any finding in favor of the plaintiff regarding the  
6 elements in this case.

7 And as to qualified immunity -- that the jury's  
8 verdict was supported by the credible evidence and proof in  
9 this case, Your Honor. Therefore, I respectfully request that  
10:47:48AM 10 the plaintiff's application be denied.

11 **THE COURT:** Yes, the motion to set aside the verdict  
12 is denied. The Court does find that there was sufficient  
13 evidence before the jury for their determination on issues of  
14 fact and the application of law for the verdict that they  
10:48:08AM 15 rendered and, therefore, the Court declines to set aside that  
16 verdict.

17 Okay, thank you. Anything else either party wanted  
18 to say?

19 **MR. LIVINGSTON:** No.

10:48:16AM 20 **MR. BENITEZ:** Nothing further.

21 **THE COURT:** I wish everybody good luck. I know  
22 everybody's got difficult jobs in these facilities, so I wish  
23 you the best.

24 Mr. Livingston, you did a very good job in  
10:48:28AM 25 presenting your case. Obviously the purpose of these trials

1 is to give individuals an opportunity to present their case to  
2 a jury, which you were able to do. You took full advantage of  
3 that and I think you did a good job as a pro se litigant.

4                   Hopefully, you can use your skills in the proper  
10:48:47AM 5 way so that when you're ultimately released to the community,  
6 you can be a productive member. I think if you use your  
7 intelligence as you have in this court, there's no reason why  
8 that can't be the case.

9                   **MR. LIVINGSTON:** Okay, thanks.

10:48:58AM 10                   **THE COURT:** Good luck to all of you as well. Thank  
11 you.

12                   (**WHEREUPON**, the proceedings adjourned at 10:49 a.m.)

13                                   \*       \*       \*

14                                   **CERTIFICATE OF REPORTER**

15  
16                   In accordance with 28, U.S.C., 753(b), I certify that  
17 these original notes are a true and correct record of  
18 proceedings in the United States District Court for the  
19 Western District of New York before the Honorable Frank P.  
20 Geraci, Jr. on October 24th, 2013.

21  
22                   S/ Christi A. Macri

23                   Christi A. Macri, FAPR-RMR-CRR-CRI  
24                   Official Court Reporter

25